DOCKETING AND CALENDARING[1]

The purpose of this paper is to explain how the New Mexico Court of Appeals goes about calendaring cases. It is divided into four sections. The first section explains the history of the Rules of Appellate Procedure which allow for calendaring. The second section explains the procedures the Court of Appeals uses to calendar cases. The third section is a discussion of cases relating to the docketing statements in regard to the calendaring process and rule violations. The fourth section discusses the expedited bench decision program.

1. INTRODUCTION

The New Mexico Rules of Appellate Procedure for Criminal Cases were drafted in 1975 with two purposes in mind: (1) to expedite the flow of criminal cases through the appellate courts by providing a docketing procedure allowing the Court to fast-track certain categories of cases in the initial stage of the appeal, and (2) to cut down on transcript volume and cost by attempting to eliminate the ordering of unnecessary portions of the transcript.

At first, the rules applied only to criminal, delinquency, and need of supervision cases. Beginning in 1983, the scope of the rules was increased to include other types of cases, notably workers' compensation and domestic relations cases. By 1987, the rules

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1 Court of Appeals Judge Lynn Pickard prepared this paper in 1982, when she was Chief Staff Attorney of the Prehearing Division of the Court of Appeals. She revised and updated it yearly through 1990. Subsequent revisions and updates have been prepared by Gina Maestas, former Chief Staff Attorney and Bridget Gavahan, current Chief Staff Attorney of the Prehearing Division of the Court of Appeal. (Rev. 8/2006)

allowing calendaring applied to all cases filed in the Court of Appeals. In 1995, contract cases were transferred from the New Mexico Supreme Court to the New Mexico Court of Appeals and are now subject to the calendaring process as well.

To the first end, i.e., expediting the flow of cases, the rules provide for the filing of a docketing statement thirty days after the notice of appeal. Rule 12-208(B) NMRA. The requirements of the docketing statement found in Rule 12-208(D)(1)-(8) should allow the Court to learn everything it needs to know to calendar the case for a faster or slower track.

The rule on calendars is Rule 12-210 NMRA. The basic differences between the calendars are as follows:

Summary:	No transcript; twenty-day briefing time; no oral argument.
Legal:	No transcript; thirty-day full briefing.
General:	Transcript; forty-five-day full briefing.

With regard to oral argument, Rule 12-214(A) NMRA provides that all matters will be decided without oral argument unless the Court otherwise directs. A party desiring oral argument on a case assigned to a nonsummary calendar has to file a separate and specific request before the time the reply brief is due.

To the second end, i.e., eliminating transcript volume and cost, the rules provide for calendars without transcript, Rule 12-210(C) and (D), and a transcript designation procedure, Rules 12-211 NMRA and 12-212 NMRA. In cases assigned to the general

calendar, the parties are able to order up any transcript and documentary exhibits they want, subject to the proviso that "[t]he appellant shall designate all portions of the proceedings material to the consideration of the issues presented in the docketing statement, but shall designate only those portions of the proceedings that have some relationship to the issues on appeal." Rule 12-211(C)(1). Non-documentary exhibits must be requested in and approved by the appellate court. Rule 12-212(B).

2. PROCEDURES FOR CALENDARING

Below are the procedures that the Court of Appeals Prehearing staff attorneys use for calendaring cases. When the record proper from the district court or administrative agency is received in the appellate clerk's office, it and the Court of Appeals' file, containing the docketing statement, are routed to a Prehearing staff attorney, who writes a memorandum recommending a calendar assignment. One judge is responsible for calendaring. He or she will read the memorandum, adopt or reject the recommendation, and assign the case to a calendar. Calendaring duties rotate among the judges in a manner determined by them from time to time. In the past, judges have had calendaring duties on a monthly rotation and on a longer basis. Presently, the judges are on a three-month rotation, with one judge acting as calendar judge during the third month of each rotation. Likewise, calendaring duties rotate among the staff attorneys, who generally do calendaring for six months at a time. The staff attorney is responsible for a single case until it is decided summarily or assigned to a non-summary calendar.

The following guidelines are given to the staff attorneys to use in calendaring

cases:

I. **a)** Check the record proper for a final appealable judgment or order.

b) Determine whether jurisdiction is in the Court of Appeals.

c) Check the record proper for a timely and properly filed notice of appeal.

II. Scan the issues raised.

III. Review the record proper.

IV. Verify the allegations in the docketing statement against the record proper.

V. **a)** Critically read the docketing statement to determine whether it conforms to the rules.

b) Analyze the docketing statement for the real legal problems underlying the issues raised.

VI. Review authorities cited and do independent research if necessary.

VII. Let your recommendation reflect the practicalities of our procedures.

a) Is the issue raised covered by New Mexico precedent or without merit?

b) If a *Franklin* [*State v. Franklin*, 78 N.M. 127, 428 P.2d 982 (1967)] issue is suggested, has counsel specified what the defendant wishes to raise?

c) Is there an obvious issue for reversal?

d) Is the issue a purely legal question that does not require review of the transcript and for which there is no New Mexico authority?

e) Will a review of the proceedings below be required even though counsel has drafted an adequate docketing statement?

f) Will a review of the proceedings resolve the appeal easily without extensive briefing?

Procedure I insures that there is jurisdiction in the Court of Appeals. Procedures II through VI are what the staff in fact does. Procedures VII and V(a) suggest the various calendars.

A case falling under V(a) may call for a rejection of the docketing statement and a request that it be refiled in conformity with the rules. Cases falling under VII(a) through (c) suggest a summary calendar, which would mean that the Court would issue a calendar notice or notice of proposed disposition either for affirmance or reversal. Cases falling under VII(d) suggest a legal calendar, although this calendar is rarely used. Cases falling under VII(e) suggest a general calendar. An example of a case falling under VII(e) is where potentially reversible evidentiary issues are raised but a review of the proceedings is warranted to eliminate the possibility of harmless error. Another example is where sufficiency of the evidence is raised and the factual recitation in the docketing statement appears complete but shows arguably insufficient evidence. Cases falling under VII (f) suggest assignment to the expedited bench decision program.

It should be noted that the procedures are merely guidelines and that, as a practical matter, many cases have their individual quirks which warrant departure from the guidelines. Calendaring is, in large part, an intuitive matter. On summary calendar

cases, the Court attempts to express its analysis in order to allow any memorandum in opposition to meet the Court's thinking head-on. Thus, in the calendar notice the Court explains its understanding of the facts, its perception of the issues raised, and its rationale for proposing to affirm, reverse, or dismiss the appeal. Because the Court's understanding of the facts is limited to what is contained in the docketing statement and the record proper, the summary calendar notice may contain specific requests for additional information from the parties. The summary calendar notice may also attempt to restate the issues on appeal in order to give the parties the opportunity to correct any misunderstandings that the Court may have regarding the issues presented. In short, the calendaring process is intended to be a sort of discourse between the attorneys and the Court about the issues.

The initial calendaring in summary cases is not final. *State v. Gonzales*, 110 N.M. 218, 227, 794 P.2d 361, 370 (Ct. App. 1990) (stating that calendar notice is a preliminary and tentative indication of how a panel might resolve the issues on appeal and may be issued for tactical reasons, such as to elicit more facts from the prevailing party). Thus, it is written with tentative language intended to convey that the Court will revise its view of the case if the parties provide the Court with additional facts or legal authority that would warrant a different disposition or calendar assignment. It is an invitation to engage in a discussion with the Court about the proper disposition of the appeal.

Thus, the party against whom the proposed disposition is made may file a

memorandum in opposition to the proposal. That memorandum in opposition should clearly point out the errors in fact and law to the Court. *Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683. A failure to file a memorandum in opposition constitutes acceptance of the disposition proposed in the calendar notice. *Frick v. Veazey*, 116 N.M. 246, 247, 861 P.2d 287, 288 (Ct. App. 1993). A memorandum in support of the proposed disposition may also be filed. However, such memoranda are rarely filed. Memoranda, either in opposition or in support, should be used to respond to the Court's notice, not to engage in a war of words with the other side.

After the Court considers the memoranda, it may issue a further notice of assignment to the summary calendar, to the nonsummary calendar, or dispose of the case by opinion.

For the past several years, the Court of Appeals has disposed of between fifty and sixty percent of its cases summarily. The Court keeps statistics on the percentage of cases, civil and criminal, that are disposed of summarily. Those statistics are kept on a monthly basis, based on the month in which the case was first calendared. Complete statistics are available when all cases calendared during a particular month have either been disposed of summarily or assigned to a nonsummary calendar.

3. DISCUSSION OF CASES

A. DOCKETING STATEMENT - RESPONSIBILITY

Rule 12-208(A) states that trial counsel is responsible for filing the docketing

statement. In *Loverin v. Debusk*, 114 N.M. 1, 1-2, 833 P.2d 1182, 1182-83 (Ct. App. 1992), the Court explained the reason for that requirement: trial counsel is in a better position to know what evidence and facts were presented below. The Court's calendaring system depends on a thorough and accurate statement of the facts. *See State v. Ibarra*, 116 N.M. 486, 489, 864 P.2d 302, 305 (Ct. App. 1993). Thus, it is ultimately trial counsel's responsibility to prepare and file the docketing statement.

B. DOCKETING STATEMENT -ISSUES

The Rules of Appellate Procedure provide that the docketing statement states the issues and how they were preserved in the trial court, Rule 12-208(D)(4), and that trial counsel determines the issues to raise, Rule 12-208(A). There are provisions for amending docketing statements, Rule 12-208(F), and errors being raised for the first time on appeal, Rule 12-216 NMRA. The rules used to provide that only the issues raised in the docketing statement could be briefed when the case was assigned to the general calendar. Thus, there is a line of older Court of Appeals and Supreme Court cases holding that issues not presented in the docketing statements will not be considered on appeal. *See, e.g.*, *State v. Vogenthaler*, 89 N.M. 150, 153, 548 P.2d 112, 115 (Ct. App. 1976).

However, the appellate rules were amended so that for appeals filed after July 1, 1990, the rule restricting argued issues to those listed in the docketing statement applies only to cases on a summary calendar. *See* Rules 12-210, and -213 NMRA. Thus, once a case has been assigned to a nonsummary calendar, the docketing statement no longer

limits the issues that can be briefed. *State v. Salgado*, 112 N.M. 537, 538, 817 P.2d 730, 731 (Ct. App. 1991). Nevertheless, the issues generally must still have been raised in the trial court. *Id.* Once a case has been reassigned to a nonsummary calendar, issues that may have been considered abandoned by failure to argue them during the summary calendaring process, *see State v. Martinez*, 97 N.M. 585, 586, 642 P.2d 188, 189 (Ct. App. 1982), are revived and may be briefed. *State ex rel. State Police Dep't v. One 1984 Pontiac 6000*, 111 N.M. 85, 90, 801 P.2d 667, 672 (Ct. App. 1990), *aff'd on other grounds*, *In re Forfeiture of $2,730*, 111 N.M. 746, 809 P.2d 1274 (1991).

The rules that have developed over time regarding issues being limited to those raised in the docketing statement or proper amendment thereto, are still valid for cases being disposed of on a summary calendar. As far as construing the issues in the docketing statement is concerned, *Eller v. State*, 90 N.M. 552, 554, 566 P.2d 101, 103 (1977), stands for the proposition that docketing statements are not read like long form indictments. If the basic issue is revealed, the Court will reach that issue even though it is not in the proper place or form. *Id.*

State v. Jacobs, 91 N.M. 445, 450, 575 P.2d 954, 959 (Ct. App. 1978), was the first case to recognize the possibility of amending the docketing statement, but its tone is to discourage new appellate counsel from raising new issues, not thought of by trial counsel and not included in the docketing statement, on appeal. *Jacobs*' holding, that a motion to amend the docketing statement filed well into an extension of briefing time will be denied, has been overruled by *State v. Moore*, 109 N.M. 119, 129, 782 P.2d 91,

101 (Ct. App. 1989). However, nothing in *Moore* or the more recent cases indicates any intent to relax the substantive requirements for amending docketing statements, which now apply only to cases on summary calendars. Dicta in *State v. Ramming*, 106 N.M. 42, 43-44, 738 P.2d 914, 915-16 (Ct. App. 1987), also discourages the raising of new issues. Although the *Ramming* Court decided the new issues on their merits and thus did not find it necessary to decide whether to allow amendment to raise them, the Court did note that there is nothing unconstitutional or unfair about denying a criminal defendant the right to raise non-meritorious issues. *Id.* at 44, 738 P.2d at 916. While *Ramming* was decided on a nonsummary calendar, the dicta will probably be held to apply to summary cases.

In *State v. Rael*, 100 N.M. 193, 668 P.2d 309 (Ct. App. 1983), the Court of Appeals stated it would not grant motions to amend the docketing statement where the issues were so without merit as not to be viable. *Id.* at 197, 668 P.2d at 313. It also clarified the procedure to be followed in moving to amend a docketing statement. *Id.* The following rule was set forth: a motion to amend to raise new issues will be granted only if

1. the motion is timely;

2. it states all facts material to a consideration of the issues;

3. it states the issues and how they were preserved or shows why they need not be preserved;

4. it states the reason why the issues were not originally raised and shows just cause or excuse for not originally raising them; and

5. it complies in other respects with the appellate rules insofar as necessary under the circumstances of the case.

Id.

Moore clarified what is meant by issues that are so without merit as not to be viable, instructed counsel that the *Rael* criteria must be addressed in each and every case in which a docketing statement amendment is sought, and explained some of the reasons for the criteria. *Moore*, 109 N.M. at 129, 782 P.2d at 101. Both *Moore* and *Rael* should be read and studied before any attempt is made to amend the docketing statement in cases on a summary calendar. *Compare State v. Gallegos*, 109 N.M. 55, 65, 781 P.2d 783, 793 (Ct. App. 1989), reaffirmed in *Moore*, in which the Court held that good cause was not shown for an amendment when the reason the issue was not originally raised was mere "inadvertence," *and State v. Lara*, 109 N.M. 294, 296, 784 P.2d 1037, 1039 (Ct. App. 1989), where a docketing statement amendment was denied because the issue was so without merit as not to be viable, but where the Court noted that it appeared trial counsel had not raised the issue in the docketing statement because it had not been preserved in the trial court, *with State v. Baca*, 111 N.M. 270, 804 P.2d 1089 (Ct. App. 1990), in which the Court suggested that a clerical error might be an appropriate reason for allowing amendment where trial counsel, who was distracted at the time that he filed the docketing statement by his representation of a client in a capital case, admitted that he overlooked the issues that appellate counsel sought to raise. *Id.* at 273, 804 P.2d at 1092.

The question of timeliness of a motion to amend on a summary calendar was further elucidated in *State v. Smith*, 102 N.M. 350, 695 P.2d 834 (Ct. App. 1985), *overruled on other grounds by Gillespie v. State*, 107 N.M. 455, 456, 760 P.2d 147, 148 (1988). There, upon a receipt of a calendar notice for summary affirmance, defendant filed a memorandum in opposition and a motion to amend. *Smith*, 102 N.M. at 352, 695 P.2d at 836. The motion to amend was granted and summary affirmance was again proposed. *Id.* Defendant filed another motion to amend, seeking to raise an issue neither raised in the original docketing statement nor in the first motion to amend. *Id.* The Court denied the second motion to amend on grounds of untimeliness because the rules do not contemplate multiple motions to amend the docketing statement. *Id.* at 353, 695 P.2d at 837. Rather, all proposed amendments should be stated in the first motion to amend. *See Ramming*, 106 N.M. at 43, 738 P.2d at 915.

There is an exception to some of the foregoing rules for matters that may be raised for the first time on appeal. One example is the constitutionality of a statute. *State v. Aranda*, 94 N.M. 784, 787, 617 P.2d 173, 176 (Ct. App. 1980). Others are certain types of fundamental error. *See State v. Coates*, 103 N.M. 353, 356 n.1, 707 P.2d 1163, 1166 n.1 (1985), *overruled on other grounds by State v. Brule*, 1999-NMSC-026, ¶ 3, 127 N.M. 368, 981 P.2d 782, where issues of failure to amend the criminal information to conform to the bind-over order and prosecutorial vindictiveness were found to involve fundamental rights to due process; *State v. Sanchez*, 98 N.M. 781, 782, 652 P.2d 1232, 1233 (Ct. App. 1982), where the issue of ineffective assistance of

counsel was not listed in the docketing statement; *and State v. Hughes*, 108 N.M. 143, 151, 767 P.2d 382, 390 (Ct. App. 1988), where an untimely motion to amend raised a double jeopardy issue. On the other hand, the giving of lesser-included offense instructions is not the type of issue that can be raised for the first time on appeal. *State v. Hernandez*, 95 N.M. 125, 126, 619 P.2d 570, 571 (Ct. App. 1980).

While it is true that the Court may address fundamental and jurisdictional issues on its own motion and thus one can question whether a docketing statement amendment is even necessary in that situation, *Moore* states that all *Rael* criteria should be addressed in each and every case because argument on the *Rael* criteria helps the Court assess whether the issue is of the sort that may be raised without procedural formalities. *Moore*, 109 N.M. at 128-29, 782 P.2d at 100-01.

C. DOCKETING STATEMENT AND CALENDARING - PROCEDURAL MATTERS

If a docketing statement cannot be timely filed, the district court has no jurisdiction to extend the time for filing it. Only the appellate court may extend the time for filing the docketing statement. *State v. Brionez*, 90 N.M. 566, 567, 566 P.2d 115, 116 (Ct. App. 1977).

The Court in *Brionez* also decided that a timely docketing statement is one filed on or before the tenth day following the filing of a notice of appeal. *Id.* at 568, 566 P.2d at 117. (*Brionez* was decided under former appellate rules with ten-day rather than thirty-day filing time.) The three-day mailing rule, Rule 12-308(B), did not apply

because it only applies when something is served on a party by mail, which service then triggers the time running for what the party must do. *Brionez*, 90 N.M. at 568, 566 P.2d at 117. *Trujillo v. State*, 90 N.M. 666, 667, 568 P.2d 192, 193 (1977), appears inconsistent with *Brionez*, insofar as application of the three-day mailing rule is concerned. However, one can view the cases consistently because the triggering event in *Brionez* was the filing of the notice of appeal performed by the same person required to file the docketing statement, whereas in *Trujillo* it was the Court's calendar assignment, usually mailed to counsel. The current rules clarify matters by stating that memoranda in opposition are due within twenty days of service of the calendar notice. Rule 12-210(D)(3). Also, the rules specifically state that the three-day mailing rule does not apply, unless the calendar notice is mailed. Rule 12-210(A).

In cases that have been assigned to the summary calendar, the parties opposing summary disposition often argue that theirs are cases of first impression, necessitating a formal opinion, and thereby precluding disposition summarily. Despite the fact that approximately two dozen formal opinions had issued from summary cases, it was not until *Garrison v. Safeway Stores*, 102 N.M. 179, 180, 692 P.2d 1328, 1329 (Ct. App. 1984), that the Court expressly approved of this procedure. The Court therein set forth the standard that, if it believed the application of legal principles to the undisputed facts of the case to be clear, then the case was appropriate for summary disposition. *Id.* Similar holdings are found in *State v. Mondragon*, 107 N.M. 421, 424, 759 P.2d 1003, 1006 (Ct. App. 1988); *State v. Johnson*, 107 N.M. 356, 357-58, 758 P.2d 306, 307-08

(Ct. App. 1988); and *Arias v. AAA Landscaping*, 115 N.M. 239, 241, 849 P.2d 382, 384 (Ct. App. 1993).

D. DOCKETING STATEMENT AND CALENDARING - FACTS AND ISSUES: LEGAL CALENDAR

As far as the facts on a legal calendar are concerned, the Court in *State v. Pohl*, 89 N.M. 523, 524, 554 P.2d 984, 985 (Ct. App. 1976), held that when a case is assigned to the legal calendar and there is no objection to the recitation of the facts, the facts recited in the docketing statement become the facts of the case. *State v. Clark*, 89 N.M. 695, 696, 556 P.2d 851, 852 (Ct. App. 1976), and *State v. Rivera*, 92 N.M. 155, 156, 584 P.2d 202, 203 (Ct. App. 1978), followed *Pohl*.

As noted above, the issues presented for review used to be limited to those raised in the docketing statement. *See State v. Alderete*, 88 N.M. 619, 620, 544 P.2d 1184, 1185 (Ct. App. 1976), for a case applying this rule to the legal calendar. Because the briefing rule now allows argument on any issues regardless of the docketing statement, the question arises whether new issues can be raised on a legal calendar. Because there is no transcript, Rule 12-210(C)(1), and because it will be unlikely that the docketing statement will contain facts not relevant to the issues raised in the docketing statement, there will probably not be any cases where new issues are sought to be raised in cases on the legal calendar.

Another question that could arise in cases assigned to a legal calendar concerns whether the docketing statement contains sufficient facts for an appellee to raise issues

not raised by appellant for the purpose of affirming the judgment. Because the Court decided cases such as *Alderete* on a legal calendar, it had no transcript to review; therefore, the Court was unable to determine if the appeal might be resolved by application of the settled principle that the trial court will be affirmed if right for the wrong reason. If that principle could apply to a case assigned to a legal calendar, it should probably be immediately called to the Court's attention.

E. DOCKETING STATEMENT AND CALENDARING - FACTS: GENERAL CALENDAR

State v. Calanche, 91 N.M. 390, 392, 574 P.2d 1018, 1020 (Ct. App. 1978), is the seminal case dealing with facts established by the docketing statement where a transcript is also involved. Where a trial transcript is not authorized (summary or legal calendar), unchallenged factual recitations in the docketing statement are the facts of the case. Where a transcript is authorized (general calendar), the facts in the transcript are the facts of the case. Thus, a transcript will override factual assertions in a docketing statement. *Udall v. Townsend*, 1998-NMCA-162, ¶ 8, 126 N.M. 251, 968 P.2d 341; *see also In re Application of Metro. Invs., Inc.*, 110 N.M. 436, 440, 796 P.2d 1132, 1136 (Ct. App. 1990) (appellate court will strike portions of the docketing statement not supported by the record). Similarly, material attached to the docketing statement that is not part of the record will not be considered. *State v. Lucero*, 90 N.M. 342, 345, 563 P.2d 605, 608 (Ct. App. 1977). Although *Calanche* was decided on a limited calendar, that calendar has since been abolished, having been replaced by the general calendar.

There will be few principles applicable to the limited calendar that will not now apply to the general calendar that replaced it.

State v. Padilla, 95 N.M. 86, 619 P.2d 190 (Ct. App. 1980), should be noted at this point. There, the docketing statement asserted that the defendant testified at trial. *Id.* at 87, 619 P.2d at 191. The testimony was not, however, included in the transcript. *Id.* The issue raised by Padilla required review of all evidence produced at trial, but because his testimony was not before the appellate court, that Court affirmed the trial court for lack of a record. *Id.* at 87-88, 619 P.2d at 191-92. It is unclear why the Court accepted Padilla's docketing statement assertion that he had testified at trial. It is further unclear whether the case stands for the proposition that a complete transcript is always required whenever review of the entire proceedings is appropriate, e.g., on search and seizure issues or issues that may call for a harmless error analysis. However, later cases cite *Padilla* for the sweeping proposition that, "it is the appellant's responsibility to provide the [C]ourt with the record on appeal, and when a record is incomplete, this [C]ourt assumes the missing portions would support the trial court's determination." *Eldridge v. Aztec Well Servicing Co.*, 105 N.M. 660, 662, 735 P.2d 1166, 1168 (Ct. App. 1987). Section H also discusses appellants' responsibilities in regard to the record.

F. DOCKETING STATEMENT AND CALENDARING - FACTS: SUMMARY CALENDAR

The summary calendar proceeds on the assumption that the facts recited in the docketing statement are the facts of the case. On these facts, if the case may be decided

on the basis of settled legal principles, it is assigned to the summary calendar. *Taylor v. Van Winkle IGA Farmer's Market*, 1996-NMCA-111, ¶ 1, 122 N.M. 486, 927 P.2d 41. If the party adversely affected by the calendar assignment disputes facts or wishes to add further facts, this may be done in a memorandum in opposition as there is no provision in the appellate rules for a response to a docketing statement. However, parties may not speculate about facts to raise issues the trial transcript might develop or support. *State v. Roybal*, 100 N.M. 155, 157, 667 P.2d 462, 464 (Ct. App. 1983).

In *Maldonado v. State*, 93 N.M. 670, 672, 604 P.2d 363, 365 (1979), the Court of Appeals had summarily affirmed an issue dealing with allegedly inadmissible evidence before the grand jury. Because this was not an issue for this Court's review, the facts were accepted and the Supreme Court affirmed. *Id. State v. Rhea*, 94 N.M. 168, 608 P.2d 144 (1980), appeared to severely limit the use of the summary calendar. However, *Rhea* was itself severely limited in *State v. Olloway*, 95 N.M. 167, 168, 619 P.2d 843, 844 (Ct. App. 1980).

Two Supreme Court cases respectively approved and disapproved of the Court of Appeals' use of the summary calendar under the facts of those cases. *State v. Sisneros*, 98 N.M. 201, 202, 647 P.2d 403, 404 (1982), involved a plea bargain with an alleged promise of an illegal sentence. The Court of Appeals accepted the docketing statement assertion that the promise was made by the prosecutor and relied upon by defendant. *Id.* The case was assigned to the summary calendar with summary reversal proposed. *Id.* The state responded, asserting that the facts were not correct and urging

a calendar reassignment so that it could be determined whether the written plea bargain contained this alleged promise. *Id.* The Supreme Court held that the state's response did not show cause why there should not be a summary reversal on this issue. *Id.* "The opposing party to summary disposition must come forward and specifically point out errors in fact and in law." *Id.*; *see Hennessy*, 1998-NMCA-036, ¶ 24; *State v. Greg R.*, 104 N.M. 778, 779, 727 P.2d 86, 87 (Ct. App. 1986).

At issue in *State v. Anaya*, 98 N.M. 211, 212, 647 P.2d 413, 414 (1982), was the sufficiency of the evidence to sustain a charge of second degree murder. The Court of Appeals summarily reversed because the factual recitation in the docketing statement showed self-defense. *Id.* The state's memorandum in opposition opposed the reversal and pointed out additional facts which cast doubt on the self-defense claim. *Id.* The Supreme Court appeared disturbed by the summary reversal of a jury verdict on grounds of sufficiency of the evidence and held that the jury verdict, together with the additional facts provided by the state, required a reassignment to a nonsummary calendar. *Id.* at 212-13, 647 P.2d at 414-15.

In the same vein, the Supreme Court decided that the sufficiency of the evidence in other cases could not be adequately reviewed except on a limited or general calendar. *State v. Leal*, 103 N.M. 299, 299-300, 706 P.2d 510, 510-11 (1985); *Garcia Lopez v. State*, 107 N.M. 450, 450, 760 P.2d 142, 142 (1988). However, the Court of Appeals does decide many cases raising sufficiency of the evidence as an issue on the summary calendar. *See Udall*, 1998-NMCA-162, ¶ 3. The standard used is whether, in the

Court's opinion, the recitation of facts in the docketing statement shows that the evidence was sufficient. *State v. Sheldon*, 110 N.M. 28, 28, 791 P.2d 479, 479 (Ct. App. 1990). This is a judgment call, on which different judges on the appellate courts are bound to occasionally differ. Thus, for example, in *Sheldon*, both the Court of Appeals and Supreme Court believed the docketing statement was sufficient and the case could be decided summarily. On the other hand, in *Garcia Lopez*, the Court of Appeals believed the docketing statement was sufficient while the Supreme Court did not. 107 N.M. at 451, 760 P.2d at 143. What this means is that opposition to a summary calendar should probably be argued on the facts of the particular case, rather than on the blanket proposition that sufficiency of the evidence issues should never be decided on the summary calendar. However, a mere suggestion that the statement of facts in the docketing statement may be deficient does not justify assignment to the general calendar. *State v. Charlton*, 115 N.M. 35, 37, 846 P.2d 341, 343 (Ct. App. 1992) (where there were no allegations that there were relevant facts of which the court was unaware).

The summary calendar was challenged on due process grounds in *Ibarra*, 116 N.M. 486, 864 P.2d 302. The Court of Appeals reaffirmed its prior holding in *Sheldon* that appeals challenging the sufficiency of the evidence to support a conviction can be disposed of on the summary calendar when the docketing statement and memoranda in response to the calendar notice provide sufficient undisputed facts for review of the issues. *Ibarra*, 116 N.M. at 489, 864 P.2d at 305. The Court of Appeals further held that the New Mexico summary calendar system does not violate the Fourteenth

Amendment due process clause. *Id.*

G. BRIEFING - PROCEDURAL MATTERS RELATING TO CALENDARING

As noted above, in *One 1984 Pontiac 6000*, 111 N.M. at 90, 801 P.2d at 672, the Court of Appeals held that in cases reassigned from the summary to a nonsummary calendar, all issues properly raised during the summary calendaring process are revived and may be briefed, regardless of whether they would have been deemed abandoned had the case been decided summarily.

A related issue is whether it is necessary to fully brief all issues a party wants raised when counsel feels these issues were adequately addressed during the summary calendaring process. In *State v. Urban*, 108 N.M. 744, 745, 779 P.2d 121, 122 (Ct. App. 1989), the Court of Appeals addressed the merits of issues, that were simply restated in the brief in chief in a case reassigned to a nonsummary calendar, by affirming for the reasons stated in the calendar notice. However, the later case of *State v. Aragon*, 109 N.M. 632, 634, 788 P.2d 932, 934 (Ct. App. 1990), refused to consider issues restated in the brief, incorporating by reference prior arguments made while the case was on a summary calendar. The reasons given for this are that it is unfair to expect counsel for the appellee and the Court to wade through the entire Court of Appeals file looking for appellant's contentions and it could allow violations of the page limits on briefs. When a case is reassigned to a nonsummary calendar, all the parties' contentions should be contained in one set of manageable briefs as provided for in Rule 12-213. Both the

Court of Appeals and Supreme Court continue to follow the practice of requiring that all of the parties' contentions be raised in the briefs. *State v. Clark*, 1999-NMSC-035, ¶ 3, 128 N.M. 119, 990 P.2d 793; *United Nuclear Corp. v. State ex rel. Martinez*, 117 N.M. 232, 233, 870 P.2d 1390, 1391 (Ct. App. 1994).

H. RULE VIOLATIONS

Shortly after the rules allowing calendaring were first adopted in 1975, the Court of Appeals utilized Rule 12-312 to dismiss cases for what appeared to be technical rule violations. A series of Supreme Court cases limited dismissals for rule violations to extreme cases, as expressly provided in the rule. The proper remedy now for technical violations is to hold the offending attorney in contempt. *Vigil v. State*, 89 N.M. 601, 602, 555 P.2d 901, 902 (1976); *Linam v. State*, 90 N.M. 302, 303, 563 P.2d 96, 97 (1977); *Olguin v. State*, 90 N.M. 303, 305, 563 P.2d 97, 99 (1977); *Eller*, 90 N.M. at 554, 566 P.2d at 103. The Court of Appeals, however, did dismiss *State v. Laran*, 90 N.M. 295, 296-96, 562 P.2d 1149, 1149-50 (Ct. App. 1977), which involved both the attorney's failure to timely order the transcript and, perhaps more significantly, his failure to appear at an order to show cause hearing. In *Martinez v. Roscoe*, 2001-NMCA-083, ¶¶ 1-2, 131 N.M. 137, 33 P.3d 887, the Court of Appeals dismissed an appeal filed by a non-attorney individual on behalf of a corporation of which he was the manager. An appellant opposed the dismissal on the basis that Rule 12-312 did not give this reason as a ground for dismissal. *Id.* ¶ 13. The Court pointed out that it had dismissed numerous appeals on grounds not specifically listed in Rule 12-312. *Id.*

In *In re Avallone*, 91 N.M. 777, 778, 581 P.2d 870, 871 (1978), the Supreme Court affirmed an order of the Court of Appeals holding counsel in contempt and fining him $250 for violations of the rules regarding transcripts. The Supreme Court, in an original disciplinary proceeding, has held attorneys in contempt and fined them for failing to file a timely docketing statement in a criminal case. *In re Palafox*, 100 N.M. 563, 564, 673 P.2d 1296, 1297 (1983). In *State v. Baca*, 92 N.M. 743, 745, 594 P.2d 1199, 1201 (Ct. App. 1979), the Court of Appeals dismissed the state's appeal because it considered the state's three-month delay in beginning the required procedures for ordering the transcript to be extreme. The Court noted that it was doubtful whether the same considerations of leniency applicable to a criminal defendant as appellant would be applicable to the state as appellant. *Id.* The case was not, however, decided on this ground, and that statement has since been called into question. *See State v. Alingog*. 116 N.M. 650, 654, 866 P.2d 378, 382 (Ct. App. 1993), *rev'd on other grounds*, 117 N.M. 756, 877 P.2d 562 (1994).

The foregoing cases dealt mainly with timeliness and the burden on the appellant to take steps to insure that his appeal progressed. A number of cases have dealt with rule violations which affect the ability of the Court to understand and decide the case. The Court in *State v. Reese*, 91 N.M. 76, 80, 570 P.2d 614, 618 (Ct. App. 1977), stated that it would refuse to consider a party's contention where the citations to the transcript were sparse and improper. In *State v. Lovato*, 94 N.M. 780, 782, 617 P.2d 169, 171 (Ct. App. 1980), however, the Court reached the merits of the party's contentions despite the same

rule violation. *See also State v. Sparks*, 102 N.M. 317, 319, 694 P.2d 1382, 1384 (Ct. App. 1985); *but see State v. McCall*, 101 N.M. 616, 630-31, 686 P.2d 958, 972-73 (Ct. App. 1983), *reversed on other grounds*, 101 N.M. 32, 677 P.2d 1068 (1984). The Court of Appeals has refused to consider a challenge to the sufficiency of the evidence where the appellant failed to include the substance of all the evidence bearing upon a proposition. *See Maloof v. San Juan County Valuation Protests Bd.*, 114 N.M. 755, 759, 845 P.2d 849, 853 (Ct. App. 1992). The Court of Appeals has held that failure to comply with Rule 12-213(A)(3), requiring a summary of proceedings with citation to the record, can result in affirmance of challenges to the sufficiency of the evidence. *Martinez v. Southwest Landfills, Inc.*, 115 N.M. 181, 184-86, 848 P.2d 1108, 1111-13 (Ct. App. 1993). The Court of Appeals continues to hold that the failure to include the substance of evidence bearing on a proposition can result in a finding that the party has waived the contention. *Murillo v. Payroll Express*, 120 N.M. 333, 338, 901 P.2d 751, 756 (Ct. App. 1995).

More recently, the Court of Appeals dismissed three companion cases due to the failure of appellant's counsel to file a brief that complied with Rule 12-213(A)(4), as the brief failed to include citations to the record in support of factual assertions contained in the brief. *See Martinez v. State ex rel. Taxation and Revenue Dep't*, 1999-NMCA-103, ¶¶ 1, 5-6, 127 N.M. 600, 985 P.2d 770. Although the Court held a contempt hearing in *Martinez*, the attorney representing the Motor Vehicle Division (MVD) of the New Mexico Taxation and Revenue Department was not held in contempt because the

Court determined that there were extenuating circumstances and the underlying problem was overwork of the attorney assigned to handle MVD cases. *Id.* ¶ 3. Nevertheless, the Court of Appeals concluded that

> dismissal is the only responsible sanction in this case. To strike the brief but consider the appeal would require this Court to do the Department's work. To order the Department to file a new brief would be too mild a deterrent to prevent a recurrence, and such an order would not be fair to the appellees. We are not in the practice of providing appellants with multiple opportunities to submit a persuasive brief.

Martinez, 1999-NMCA-103, ¶ 5. Although dismissal of a case for failure to follow the Rules of Appellate Procedure is a severe sanction, the *Martinez* case illustrates that the Court of Appeals will use this sanction in cases it deems appropriate. *See also Udall*, 1998-NMCA-162, ¶ 8 (dismissing a pro se appellant's appeal for his refusal to file a brief-in-chief).

The Supreme Court in *In re Chakeres*, 101 N.M. 684, 685, 687 P.2d 741, 742 (1984), disciplined counsel for making false and misleading statements of fact in his brief to the Court of Appeals by a fine of $1,000 and costs. *See also In re Robert Richards, Esq.*, ¶¶ 17-18, 1997-NMSC-035, 123 N.M. 579, 943 P.2d 1032 (publically censuring attorney for making false statement of fact in his brief). In *State v. Fulton*, 99 N.M. 348, 350, 657 P.2d 1197, 1199 (Ct. App. 1983), trial counsel was ordered to show cause why he should not be held in contempt for dereliction in his conduct as an officer of the court. Trial counsel's conduct offended the Court in two ways. First, relying on a provision which tolls the time for taking an appeal, he delayed for some months before

proceeding with his client's appeal. *Id.* Second, he omitted material facts from his docketing statement. *Id.* The Court has since indicated that it will sanction attorneys if a case is assigned to the general calendar and the transcript reveals that a party misrepresented the record in the docketing statement. *Udall*, 1998-NMCA-162, ¶ 4. Another case dealing with material facts is *Thornton v. Gamble*, 101 N.M. 764, 769, 688 P.2d 1268, 1273 (Ct. App. 1984), clarifying the rule that, since the appellate court reviews evidence in the light most favorable to the decision below, the docketing statement should recite any evidence supporting the trial court's findings.

In another case involving both the non-filing of a docketing statement and the Court's inability to understand and decide the case, the Court ordered trial counsel to show cause why he should not be held in contempt for failing to file a docketing statement in an appeal which trial counsel felt had no merit. *State v. Talley*, 103 N.M. 33, 38, 702 P.2d 353, 358 (Ct. App. 1985). The docketing statement had not been filed and the Court had earlier ordered trial counsel to show cause why he should not be held in contempt for his failure to file it. *Id.* Trial counsel responded that he believed he was under no obligation to file it, as it was his opinion that the appeal was frivolous. *Id.* Further, it was trial counsel's opinion that the obligation in such a case was on the appellate court to order and review the record, pursuant to *Franklin*, 78 N.M. 127, 428 P.2d 982. *Talley*, 103 N.M. at 38-39, 702 P.2d at 358-59. In a published order, the Court of Appeals again ordered that counsel show cause why he should not be held in contempt. *Id.* at 39, 702 P.2d at 359. The Court explained that *Franklin* was decided

in the context of Rules of Appellate Procedure that contemplate a verbatim transcript of proceedings. *Talley*, 103 N.M. at 39, 702 P.2d at 359. The New Mexico Rules of Appellate Procedure do not now contemplate such a transcript. *Id.* Thus:

> [r]eading *Franklin* and Rule [12-208] together, it is obvious that trial counsel's responsibility in a case where he believes the appeal is frivolous, is nonetheless to prepare a docketing statement of sufficient completeness to afford adequate appellate review . . . . This means that counsel should state the contentions advanced by a defendant . . . [and] should also include in the docketing statement a statement of all facts material to those contentions . . . .

Talley, 103 N.M. at 39, 702 P.2d at 359. The Court affirmed the *Talley* rules in *State v. Boyer*, 103 N.M. 655, 658, 712 P.2d 1, 4 (Ct. App. 1985).

Appellate practitioners need to be aware that the appellate courts may either hold them in contempt and fine them or dispose of their issues adversely based on their violations of appellate rules. *State ex rel. Educ. Assessments Sys. v. Coop. Educ. Servs. of N.M. Inc.*, 110 N.M. 331, 333, 795 P.2d 1023, 1025 (Ct. App. 1990). In addition, the Court may decide to refer offending attorneys to disciplinary counsel. *See Garcia v. City of Albuquerque*, 99 N.M. 746, 750, 663 P.2d 1203, 1207 (Ct. App. 1983) (referring plaintiff's attorney to disciplinary counsel because of a false statement of facts in his brief).

4. EXPEDITED BENCH DECISION PROGRAM

In March of 1993, the Court of Appeals initiated an experimental program called the expedited bench decision program. The program was formally adopted and expanded by order of the Court of Appeals in October of 1995. *See In the Matter of the*

Court of Appeals Caseload, No. 1-21 (filed October 17, 1995) (describing the expedited bench decision program). This order is attached as an appendix in *Rosen v. Lantis*, 1997-NMCA-033, 123 N.M. 231, 236, 938 P.2d 729, 734 (Ct. App. 1997), and *State v. Curley*, 1997-NMCA-038, 123 N.M. 295, 300, 939 P.2d 1103, 1108.

Pursuant to the expedited bench decision program, cases are assigned to the program at the time of calendaring a case to the general or legal calendar, or by motion of any party or parties. Any case on the Court's docket may be assigned to this program. Parties may file written objections to their case being assigned to the program; however, the decision as to whether the case shall remain in the program is made by the Court.

Once a case is assigned to this program, transcript and exhibit preparation proceeds under the usual Rules of Appellate Procedure. The key differences between cases assigned to the expedited bench decision program and cases assigned to the general calendar are as follows. Under the expedited bench decision program the briefing time is 20 days versus 45 days for the major briefs, and there is a 20-page versus 35-page limit for major briefs, and a 10-page versus 15-page limit for reply briefs. Once the case is briefed, it is expedited and submitted to a panel for decision at the Court's next available submission date. Every case assigned to this program is set for oral argument and the panel decides the case from the bench after oral argument, unless it is removed from the program by the Court because of the importance of the issues. *See Curley*, 1997-NMCA-038, ¶ 1. A brief written opinion is filed before 5:00 p.m. the next business day, but not later than seven days after oral argument, unless the case is

removed from the program after oral argument. Even if the case is removed from the program, it is still given the highest priority and a decision is rendered at the earliest possible date. This program is oftentimes used for cases where a transcript review is necessary to decide the issues raised, but the issues are not unique or complex. Judges' views about the efficiency of this program vary, in light of the time it can take parties and judges to thoroughly prepare for oral argument. Thus, the use of the program varies among the judges. A party should consider requesting that a case be assigned to this program if time is of the essence, and having a fast decision is essential in the case.

CONCLUSION

Docketing and calendaring of cases in the New Mexico Court of Appeals is a unique and interesting, but not so simple, process. Therefore, it is essential that practitioners review the relevant appellate rules and case annotations when handling an appeal before the Court of Appeals. The Rules of Appellate Procedure are designed to give direction and guidance to attorneys regarding how to ensure that their appeal proceeds quickly, efficiently, and appropriately through the appellate courts. A key requirement is that the factual recitation contained in any pleading filed be specific, accurate, and complete. Pleadings should also be filed within the time limits set out in the rules, or extensions of time should be sought from the appellate court before the time deadline has run. Familiarity and compliance with the Rules of Appellate Procedure will ensure that your appeal proceeds as smoothly as possible.